

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS MATHIS,

Defendant-Appellant.

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UNPUBLISHED

January 22, 2002

No. 227336

Wayne Circuit Court

Criminal Division

LC No. 99-005606

Before: Cooper, P.J., and Griffin and Saad, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of carjacking, MCL 750.529a, third-degree fleeing and eluding a police officer, MCL 257.602a(3), and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as a second habitual offender, MCL 769.10, to a term of fifteen to thirty years' imprisonment for the carjacking conviction, a concurrent term of twenty-three months to five years' imprisonment for the fleeing and eluding conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm defendant's convictions and his sentences for fleeing and eluding a police officer and felony-firearm. However, we vacate defendant's sentence for carjacking and remand for resentencing on that offense.

Defendant first argues that he was denied a fair trial because the prosecution improperly argued that defense counsel was attempting to mislead the jury during closing argument. Because defendant failed to object to the alleged improper remarks below, this Court reviews this claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

After a careful review of the record, we find that defendant was not denied his right to a fair trial because of the prosecutor's remarks. Rather, the challenged remarks, made during rebuttal argument, were responsive to defense counsel's arguments and were based on the evidence produced at trial. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Kennebrew*, 220 Mich App 601, 607-608; 560 NW 2d 354 (1996); *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). Further, a prosecutor is not required to state his arguments in the blandest possible terms. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). Because defendant failed to demonstrate plain error he is not entitled to appellate relief.

Defendant next claims that his confession should have been suppressed because the police failed to make an audio or video recording of the interrogation. We disagree. In *People v Fike*, 228 Mich App 178, 184-186; 577 NW2d 903 (1998), this Court considered the same issue and held, consistent with the majority rule throughout the United States, that the due process clause of the Michigan Constitution, Const 1963, art 1, § 17, does not require police to electronically record all custodial interrogations or confessions.

Defendant further purports that he is entitled to be resentenced because the trial court failed to state a substantial and compelling reason for its upward departure from the sentencing guidelines. MCL 769.34(3). We agree.

Because the carjacking offense occurred in May 1999, the legislative sentencing guidelines apply. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). Under the sentencing guidelines statute, the trial court must impose a minimum sentence in accordance with the calculated guidelines range. MCL 769.34(2). A trial court may not depart from the recommended sentencing range unless it “has a substantial and compelling reason for th[e] departure and states on the record the reasons for departure.” MCL 769.34(3); see also *People v Babcock*, 244 Mich App 64, 72; 624 NW2d 479 (2000). Additionally, when a trial court makes an upward departure from the sentencing guidelines range it must inform the defendant, orally and in writing, that he may appeal the sentence on the basis of the departure. MCL 769.34(7); MCR 6.425(E)(4); *Babcock*, *supra* at 73.

In the instant case, the applicable sentencing guidelines range was 81 to 168 months. MCL 777.21(3)(a). The trial court sentenced defendant to a minimum term of 180 months. The prosecutor concedes that the trial court failed to indicate its departure from the guidelines and never articulated a substantial or compelling reason for its decision. Because the trial court failed to articulate a substantial and compelling reason for its upward departure, we vacate defendant’s sentence and remand for resentencing. On remand, the trial court may impose any minimum sentence within the appropriate guidelines range or depart from that range if there is a substantial and compelling reason to do so. MCL 769.34(11); *Babcock*, *supra* at 80.

Nevertheless, we reject defendant’s claim that resentencing must take place before a different judge. We find no indication that the original trial judge is biased against defendant. *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997). In light of our acknowledgment of the error and the remand for resentencing, we need not address defendant’s claim of inadequate representation. See *People v Whitfield*, 214 Mich App 348, 354; 543 NW2d 347 (1995); *People v Fortson*, 202 Mich App 13, 21; 507 NW2d 763 (1993).

Lastly, defendant asserts that resentencing is required because he was not properly afforded his right of allocution. MCR 6.425(D)(2)(c) provides that, before imposing sentence, the trial court must “give the defendant . . . an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence.” Strict compliance with a defendant’s right of allocution is required and the trial court must specifically ask the defendant if he wishes to address the court. *People v Wells*, 238 Mich App 383, 392; 605 NW2d 374 (1999). Failure to comply with this rule requires resentencing. *Id.*

The record reveals that defendant was afforded and exercised his right of allocution. The trial court properly complied with MCR 6.425(D)(2)(c) by asking defendant if he had anything

to say on his behalf. After apologizing to the trial court and expressing his innocence, defendant began to dispute the complainant's identification of him as the assailant. At that point, the trial court briefly interrupted to advise defendant that the court was allowing him to make a statement about the sentence it should impose and that it could not nullify the jury's decision to convict him of the offenses. The trial court then gave defendant two additional opportunities to address the court on matters relevant to sentencing. Under these circumstances, we find that the trial court's brief interruption did not violate defendant's right of allocution. See *People v Reeves*, 143 Mich App 105, 107; 371 NW2d 488 (1985).<sup>1</sup>

We affirm defendant's convictions and his sentences for fleeing and eluding and felony-firearm, but vacate his sentence for carjacking and remand for resentencing. We do not retain jurisdiction.

/s/ Jessica R. Cooper  
/s/ Richard Allen Griffin  
/s/ Henry William Saad

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<sup>1</sup> Defendant also contends that defense counsel was ineffective because he failed to object to the trial court's interruption of his allocution. Because we conclude that defendant was granted his right of allocution, counsel was not ineffective for failing to make a frivolous objection. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).